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Salvador Almonte d/b/a Quisquea Construction and Quisquea Contracting and Jeronimo Pena Gomez. Case 34–CA–8308 (1–2)

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon charges and amended charges filed by Charging Party Jeronimo Pena Gomez on April 3, May 8, and May 12, 1998, the Acting General Counsel issued a consolidated complaint on May 29, 1998, against Salvador Almonte d/b/a Quisquea Construction and Quisquea Contracting (Almonte), the Respondent, alleging that it has violated Section 8(a)(1) of the Act.¹ Although properly served copies of the charges, amended charges and the complaint, Respondent Almonte has failed to file an answer.

On August 21, 1998, the Acting General Counsel filed a Motion for Summary Judgment, with attached exhibits. On August 25, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Acting General Counsel's motion should not be granted. Respondent Almonte has not filed any response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The consolidated complaint states that unless an answer is filed within 14 days of service, "all the allegations in the consolidated complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the motion for summary judgment disclose that by letter and facsimile transmission dated July 15, the Respondent was advised by counsel for the Acting General Counsel that an answer to the consolidated complaint had not yet been received and that if no answer was received by close of

business July 23, a Motion for Summary Judgment would be filed.

In the absence of good cause for failure to file a timely answer, we grant the Acting General Counsel's Motion for Summary Judgment against the Respondent.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Almonte is a sole proprietorship, owned by Salvador Almonte, and is engaged as a labor contractor in the building and construction industry. It has an office and place of business in Brooklyn, New York. During the 12-month period ending December 31, 1996, Respondent Almonte, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to Flintlock Construction, Inc. at its New York jobsites.

Flintlock is a corporation engaged as a construction manager in the building and construction industry. It has an office and place of business in Greenwich, Connecticut and jobsites in Yonkers and Greenburgh, New York. During the 12-month period ending on April 30, 1998, Flintlock, in the course and conduct of its business operations, purchased and received at its New York jobsites goods valued in excess of \$50,000 directly from points outside the State of New York.

We find that Respondent Almonte and Flintlock are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

During the period covered by the complaint, Respondent Almonte had an agreement to provide Flintlock with construction laborers for employment at Flintlock's jobsites in New York.³ About December 3 and 10, 1997, Respondent, through its president and owner, Salvador Almonte, threatened employees with termination if they engaged in protected concerted activities. About December 11, Respondent, acting through Salvador Almonte, engaged in surveillance of its employees' protected concerted activities. Also about December 11, Rafael Regalado, Fausto Munoz, Jorge Luis Garcia, Jose Delio Munoz, Francisco Anciany Garcia, Martin Dominquez, Virgilio Pena, and Luis Maria Aragonés engaged in protected concerted activities by attempting to file complaints with the United States Department of Labor

¹ The consolidated complaint also included unfair labor practice allegations in Case 34–CA–8161 against Flintlock Construction, Inc. On September 8, in response to the Acting General Counsel's motion for summary judgment, Flintlock filed an opposition to the motion for summary judgment, an answer to the complaint, and a cross-motion to remand this case to the Board's regional office. By unpublished order, the Board has this day accepted Flintlock's answer, denied the motion for summary judgment against it, severed Case 34–CA–8161 from this proceeding, and remanded that case to the Regional Director for further appropriate action.

² We note that Flintlock's answer to the then-consolidated complaint admits the complaint's jurisdictional allegations.

³ Flintlock's answer to the then-consolidated complaint denies the allegation that Flintlock and Respondent Almonte have been joint employers of the employees of Respondent Almonte at Flintlock's jobsites. It is unnecessary to decide the joint employer issue in this proceeding, which involves severable unfair labor practice allegations against Respondent Almonte. We leave to further proceedings in Case 34–CA–8161 the issue of whether Flintlock has any liability as a joint employer for Respondent Almonte's unfair labor practices.

against Almonte. On December 12, Respondent terminated the above-named employees because they engaged in the protected concerted activity described above and in order to discourage employees from engaging in these activities.

We find that, by the aforementioned threats, surveillance, and discharge actions affecting employees engaged in protected concerted activities, Respondent Almonte has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

By engaging in surveillance of employees' protected concerted activities, and by threatening to terminate and then terminating employees if they engaged in such activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Almonte has engaged in violations of Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged employees Rafael Regalado, Fausto Munoz, Jorge Luis Garcia, Jose Delio Munoz, Francisco Anciany Garcia, Martin Dominquez, Virgilio Pena, and Luis Maria Aragon, we shall order it to offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 259 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The Respondent, Salvador Almonte d/b/a Quisquea Construction and Quisquea Contracting, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Surveilling employees as they engage in protected concerted activities.

(b) Threatening employees with termination if they engage in protected concerted activity.

(c) Terminating employees because they engage in protected concerted activity and in order to discourage employees from engaging in such activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer employees Rafael Regalado, Fausto Munoz, Jorge Luis Garcia, Jose Delio Munoz, Francisco Anciany Garcia, Martin Dominquez, Virgilio Pena, and Luis Maria Aragon, full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings or other benefits suffered as a result of their unlawful termination, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the above-named employees in writing that this has been done and that the unlawful terminations will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the region, post at its facility in Brooklyn, New York, and at its jobsites in Yonkers and Greenburgh, New York, copies of the notice, marked "Appendix."⁴ Copies of the notice on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notices to all current employees and former employees employed by the Respondent at any time since December 3, 1997.

⁴ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. October 30, 1998

Sarah M. Fox,	Member
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Wilma B. Liebman,	Member
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Peter J. Hurtgen,	Member
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(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT engage in surveillance of employees' protected concerted activities.

WE WILL NOT threaten employees with termination if they engage in protected concerted activities.

WE WILL NOT terminate employees because they engage in protected concerted activity and in order to discourage employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Rafael Regalado, Fausto Munoz, Jorge Luis Garcia, Jose Delio Munoz, Francisco Anciany Garcia, Martin Dominquez, Virgilio Pena, and Luis Maria Aragones, full reinstatement to their former positions of employment, or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or other rights or privileges they previously enjoyed.

WE WILL make the above-named employees whole for any losses or other benefits suffered as a result of their unlawful termination, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of the employees named above, and WE WILL, within 3 days thereafter notify each of them in writing that this has been done and that the unlawful terminations will not be used against them in any way.

SALVADOR ALMONTE D/B/A QUISQUEA
CONSTRUCTION AND QUISQUEA CONTRACTING